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CHAPTER 6 FAMILY AND MEDICAL LEAVE ACT

EMPLOYEE ELIGIBILITY

In order to be considered "eligible," an employee must (1) have worked for the State of Tennessee for at least 12 months and (2) have worked at least 1,250 hours during the year preceding the start of the leave.

(1) 12 months of service.

The 12 months of required work with the state do not have to be consecutive in order for an employee to be eligible. However, service accrued more than 7 years ago does not have to be counted toward the minimum requirement. If an employee is maintained on the payroll for any part of a week, including periods of paid or unpaid leave during which other benefits or compensation are provided by the state (such as worker's compensation or group health plan benefits), that week is considered a week of employment. 52 weeks of such employment equals 12 months.

An employee who concludes a tour of military duty has certain rights under the Uniformed Service Employment and Reemployment Act (USERRA). Such employees shall receive credit for each month of military service which shall count toward the 12 month minimum service requirement. For example, an employee who has been employed by the state for 9 months is ordered to active military service for a period of 9 additional months. Upon completion of military service, the employee must be considered to have been employed by the state for more than the required 12 months, since 9 months were accrued while actually employed by the state and 9 months were accrued while serving in the military service.

(2) 1250 hours worked.

In determining "hours worked," the agency shall calculate all hours actually worked by an employee, including overtime hours.

An employee who returns to work under USERRA shall be credited with the hours of service that would have been performed but for the period of military service in determining whether the employee worked the 1,250 hours of service. Accordingly, a person reemployed following military service will have the hours that would have been worked added to any hours actually worked during the previous 12-month period. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations. For example, an employee who works 37.5 hours per week for the state returns to employment following 20 weeks of military service and requests leave under FMLA. To determine the employee's eligibility, the hours the employee would have worked during the period of military service (20 x 37.5 = 750 hours) must be added to the hours actually worked during the 12-month period prior to the start of the leave.

QUALIFYING CRITERIA FOR GRANTING LEAVE

Leave must be granted for any one or combination of the following:

A. The birth of a son or daughter and to care for the newborn child;
B. The placement with the employee of a son or daughter for adoption or foster care;

C. The care of the employee's spouse, son, daughter, or parent with a serious health condition;

D. Because of a serious health condition that makes the employee unable to perform the functions of the employee's job;

E. Because of any qualifying exigency arising out of the fact that an employee's spouse, son, daughter, or parent is a covered military member on active duty or has been notified of an impending call or order to active duty in support of a contingency operation; or

F. To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of a covered service member.

Definitions of Family Members

Spouse: Husband or wife as defined or recognized under Tennessee law for purposes of marriage.

Parent: Biological, adoptive, step or foster parent or an individual who currently stands in place of an absent parent. A person standing in place of an absent parent is not required to have a biological or legal relationship with a child. The only criterion is that the person has "day-to-day responsibilities to care for and financially support a child" or has had that responsibility for the employee when the employee was a child. An appointing authority may require an employee requesting FMLA leave to provide reasonable documentation confirming the family relationship including such items as a written statement from the employee, a child's birth certificate and relevant court documents. The definition does not include parents-in-law.

Son/Daughter: Biological, adopted, foster child, stepchild, legal ward, or child of a person standing in place of an absent parent who is either under age 18 or age 18 or older and "incapable of self-care because of a mental or physical disability."

Next of Kin: The nearest blood relative of a member of the Armed Services of the United States who is recovering from an injury or illness sustained in the line of active military duty.

Birth of a Son or Daughter

In addition to leave taken after the birth of a child, FMLA leave may be taken by an expectant mother for the purpose of prenatal visits and in situations where a serious health condition prevents her from performing her job duties prior to the child's birth.

Adoptive or Foster Care Placement

FMLA leave may be taken prior to an adoptive or foster care placement if the leave is integral to the placement. Examples include required counseling sessions, court appearances, and legal or medical consultations. There is no requirement in FMLA that the source of an adoption be from a licensed adoption agency in order for an employee to be eligible for FMLA leave.

Foster Care: This is defined as "24-hour care for children in substitution for, and away from, their parents or guardian." FMLA requires that this placement be made by or in agreement with the state and that state action be involved in the removal of the child from parental custody.

Serious Health Condition

For purposes of the FMLA, "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves impatient care or continuing treatment by a health care provider.

A. Inpatient Care means an overnight stay in a hospital, hospice, or residential medical care facility.

B. Continuing Treatment by a Health Care Provider

A serious health condition involving continuing treatment by a health care provider includes one or more of the following:

1. A period of incapacity of more than 3 consecutive calendar days and any subsequent treatment or period of incapacity relating to the same condition that also involves:

   (a) treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider. The first in-person visit to the health care provider must take place within 7 days of the first day of incapacity; or

   (b) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

2. Any period of incapacity due to pregnancy or for prenatal care.

3. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A "chronic" serious health condition is one which (a) requires periodic visits, at least two per year, for treatment by a health care provider or by a nurse or physician's assistant under direct supervision of a health care provider, (b) continues over an extended period of time (including recurring episodes of a single underlying condition), and (c) may cause episodic rather than continuing periods of incapacity (such as asthma, diabetes and epilepsy).

4. A long-term period of incapacity due to a condition for which treatment may not be effective. In this situation the employee or family member must be under the continuing supervision of but not need to be receiving active treatment by a health care provider. Examples include Alzheimer's, severe stroke and the terminal stages of a disease.

5. Any period of absence to receive multiple treatments, including periods of recovery from treatments, by a health care provider or by a provider of health services under orders of or referral by a health care provider, either for restorative surgery after an accident or other injury or for a condition that would likely result in a period of incapacity of more than 3 calendar days in the absence of medical intervention or treatment, such as cancer chemotherapy or radiation treatment), severe arthritis (physical therapy) and kidney disease (dialysis).

6. In the case of substance abuse, only the time absent from work due to treatment is qualifying

FMLA leave. A period of incapacity resulting from use of the substance is not considered a covered illness. Also, an employee with a substance abuse problem is not protected under FMLA from disciplinary action resulting from such substance abuse. When an agency has a non-discriminatory policy that provides for an employee's termination for substance abuse under certain circumstances and this policy has been communicated to all employees, an appointing authority may terminate the employee, whether or not the employee is on FMLA leave. The appointing authority cannot, however, take action against the employee for exercising his or her right to take FMLA leave for treatment of the substance abuse.

C. Definition of Health Care Provider

1. A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices;

2. Podiatrists, dentists, clinical psychologists, optometrists, or chiropractors. A chiropractor is limited to treatment consisting of manual manipulation of the spine to correct a dislocation demonstrated by x-ray. These professionals must be licensed in the state and performing within the scope of their practice as defined by state law;

3. Nurse practitioner, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under state law and are functioning within the scope of their practice as defined by state law;

4. Christian Science Practitioners listed with the First Church of Christ, Scientists in Boston, Massachusetts;

5. Any health care provider from whom the State or Benefits Administration will accept certification of the existence of a serious health condition to substantiate a claim for benefits; or

6. Any health care provider listed above who practices in a country other than the United States who is authorized to practice in their country and is functioning within the scope of practice as defined by the laws of that country.

D. When an employee is absent from work due to pregnancy, prenatal care or due to a chronic health condition, leave taken qualifies as FMLA leave even if the employee or family member does not receive treatment from a health care provider during the absence and even if the absence lasts less than 3 days. For example, an employee with asthma may be unable to report to work due to onset of an asthma attack he or she can treat at home. Even though the employee did not visit a health care provider and was absent for less than 3 days, the time off qualifies as FMLA leave. Another example is an employee unable to report to work due to severe morning sickness resulting from pregnancy. Although this absence was less than 3 days and the employee did not need to visit a health care provider, this time off qualifies as FMLA leave.

Military Caregiver Leave

A covered employer must grant an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered service member with a serious injury or illness up to a total of 26 workweeks of unpaid leave during a "single 12-month period" to care for the service member. A covered service member is a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. A serious injury or illness is that was incurred by a service member in the line of duty on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank, or rating. The "single 12-month period" for leave to care for a covered service member with a serious injury or illness begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12 month period established by the employer for other types of FMLA leave. An eligible employee is limited to a combined total of 26 workweeks for leave for any FMLA-qualifying reason during the "single 12-month period." (Only 12 of the 26 weeks total may be for a FMLA-qualifying reason other than to care for a covered service member.)

Military Qualifying Exigency Leave

An eligible employee may take FMLA leave while the employee's spouse, son, daughter, or parent ("the covered military member") is on active duty or has been called to active duty status for one or more of the following qualifying exigencies:

- To address issues arising from a covered military member who is notified of an impending call or order to active duty in support of a contingency operation 7 or less calendar days before deployment;
- To attend certain military functions, such as an official ceremony, program, or event sponsored by the military that is related to the active duty or call to active duty status of a covered military member. This may also include attendance at any family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to active duty or call to active duty status of a covered military member;
- To arrange for certain childcare and related activities when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement, such as arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis, enrolling or transferring a child in a new school or day care facility, and attending certain meetings at a school or a day care facility if they are necessary due to circumstances arising from the active duty or call to active duty of the covered military member;
- To make or update financial and legal arrangements to address a covered military's absence;
- To attend counseling provided by someone other than a health care provider for oneself, the covered military member, or the child of the covered military member, the need for which arises from the active duty or call to active duty status of the covered military member;
- To spend time, up to 5 days, with a covered military member who is on short-term, temporary, rest and recuperation leave during deployment;
- To attend certain post-deployment activities, including arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a

period of 90 days following the termination of the covered military member's active duty status, and addressing issues arising from the death of a covered member; or

- To address other events that the employee and employer agree is a qualifying exigency or that the United States Secretary of Labor appropriately determines to be a qualifying exigency.

LEAVE ENTITLEMENT - LIMITATIONS ON LENGTH AND DURATION

Except in the case to care for a covered service member with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during a 12 month period for any one or more of the following reasons:

1. The birth of a son or daughter and to care for the newborn child;
2. The placement with the employee of a son or daughter for adoption or foster care;
3. The care of the employee's spouse, son, daughter, or parent with a serious health condition;
4. Because of a serious health condition that makes the employee unable to perform the functions of the employee's job; or
5. Because of any qualifying exigency arising out of the fact that an employee's spouse, son, daughter, or parent is a covered military member on active duty or has been notified of an impending call or order to active duty in support of a contingency operation.

This 12 workweek limit is equivalent to 60 workdays, including holidays. The initial 12 month period starts on the date the employee's FMLA leave first begins and extends 12 months forward from that date. A new 12 month period would begin the first time FMLA leave is taken after completion of any previous 12 month period. However, an eligible employee who takes leave to care for the covered service member with a serious injury or illness begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12 month period established by the employer for other types of FMLA leave.

An eligible employee's leave is limited to a total of 26 workweeks of leave during a single 12 month period to care for a covered service member with a serious injury or illness. If an employee receives 26 workweeks of leave for military reasons, the employee is not eligible for additional FMLA leave during the same period. If an employee combines leave for caring for an eligible service member and another qualifying FMLA leave, only 12 workweeks may be used for leave unrelated to the care of a covered service member.

Limitations on FMLA Leave Entitlement for Birth of a Child or Adoption or Foster Care Placement

Leave entitlement for the birth of a child or for adoption or foster care placement expires at the end of the 12 month period beginning on the date of the birth or placement. FMLA leave for these reasons must be concluded within this time period.

FMLA Leave Conditions When Both Spouses are State Employees

Spouses who are both state employees are limited to a combined total of 12 weeks of FMLA leave during a 12 month period if the leave is taken for the following reasons:

1. To care for the employee's parent with a serious health condition;
2. Birth of a child or for care of the child after birth; or
3. Adoptive or foster care placement of a child or for care of the child after placement.

If each spouse uses leave for one of these reasons and needs to use leave for a different reason later in the 12 month period (such as to care for the employee's own serious health condition or that of a spouse, son, or daughter), he or she is entitled to the difference between the amount each took individually for birth, adoption, or to care for an ill parent for a total of 12 weeks of leave. For example, if each spouse uses 6 weeks of leave (totaling 12 weeks) for the birth of a child, each spouse can take an additional 6 weeks of leave for a serious personal illness.

Spouses are limited to a combined total of 26 workweeks in a single 12-month period if the leave is to care for a covered service member with a serious injury or illness, and for the birth and care of a newborn child, for placement of the a child for adoption or foster care, or to care for a parent who has a serious health condition.

Use of Intermittent Leave

An eligible employee may take intermittent FMLA leave or have a reduced leave schedule over a 12 month time period if the purpose of the leave is to care for an employee's own serious health condition, to care for the serious health condition of a family member, to care for a covered service member with a serious injury or illness, or for a qualifying exigency arising out of active duty status or call to active duty status of a covered military member. The situation must be one in which the employee's or family member's needs can best be treated through an intermittent or reduced leave schedule. Employees may not use intermittent FMLA leave following the birth of a child or adoptive or foster care placement for any reason other than medical necessity.

In situations where intermittent leave is granted, appointing authorities have the option not to count leave amounts of less than one workday against the 12 week entitlement total, depending on the employee's situation. For example, if an employee uses 2 hours of leave 3 times a week to go to physical therapy, the appointing authority has the option not to count any of this leave against the 12 week entitlement.

If an employee requests intermittent leave or leave resulting in a reduced work schedule, based on the need for planned medical treatment for the employee, a family member or a covered service member, including a period of recovery from a serious health condition, the appointing authority may require that the employee transfer temporarily to another position for which the employee is qualified and which better accommodates the employee's need for recurring leave periods. This temporary position must have equivalent pay and benefits, but need not have equivalent duties. Under no circumstances shall an appointing authority transfer an employee to an alternative position with the intent of discouraging the employee from taking leave or causing hardship to the employee.

CRITERIA FOR USING PAID AND UNPAID FAMILY LEAVE

Family and medical leave may be paid or unpaid, depending upon certain conditions. An employee with no accumulated sick, annual, or compensatory leave balances must take his or her leave as unpaid. An

employee who does possess a leave balance has the option, under certain conditions, of using this accumulated leave as FMLA leave and remaining in a paid status. Specific conditions regarding the type of accumulated leave that may be taken are covered below.

A. An employee must request to use any form of paid leave if it is to run concurrently with the FMLA leave.

B. An employee may request to use unpaid leave despite having a leave balance. However, before an employee can go on unpaid leave, all accumulated compensatory leave must be used. The employee has the option, however, of retaining his or her sick and annual leave balances.

C. If an employee chooses to use accumulated leave as FMLA leave, the leave used is subject to existing state laws and regulations regarding the type and amount of leave that can be used under specific circumstances.

Example: An employee requests 12 weeks of FMLA leave following the birth of a child. Under existing state law, only 30 days (6 workweeks) of sick leave may be used to care for a well child following childbirth. Thus, the employee can only use 6 weeks of sick leave as FMLA leave and the remaining 6 week balance must be taken as compensatory, annual or unpaid leave.

Under current state law, an employee is entitled to up to 4 months of maternity leave. Therefore, once the 12 week FMLA entitlement is completed, this employee is still eligible to take an additional 4 weeks of maternity leave. However, the state is under no obligation to provide health insurance benefits during this period, should the leave be without pay.

Counting Paid and Unpaid Leave toward the Employee's 12 Week Leave Entitlement

The appointing authority of each agency is responsible for designating paid and unpaid leave as FMLA leave. This designation must be based only on information provided by the employee or the employee's spokesperson. A "spokesperson" includes the employee's spouse, adult child, parent, doctor or other individual providing information when the employee is incapacitated.

An employee may request to use accumulated compensatory leave for family, medical and military reasons and is required to use such leave before being granted leave without pay. However, an appointing authority may not designate any compensatory leave used for family and medical reasons against the 12 week entitlement.

An appointing authority may also designate time an employee is receiving worker's compensation benefits as FMLA leave when qualifying conditions are met. If an employee's injury qualifies as FMLA leave, the employee cannot be forced to return to light duty work before the leave expires. If the employee freely accepts light duty work before the 12 weeks of FMLA leave expire, the employee still has the right to return to his or her original or an equivalent position within 12 weeks from the date FMLA leave began.

An appointing authority has the option not to designate the first 15 business days of FMLA qualifying leave against the employee's 12 week entitlement. Any additional FMLA qualifying leave needed by an employee (paid or unpaid) must be designated.

Time Limitations for Appointing Authority to Designate Leave as FMLA Leave

The appointing authority shall designate leave as FMLA leave as soon as possible after the sufficient information is available to determine that the leave requested is for a reason covered by FMLA guidelines. At the point sufficient information has been obtained, the appointing authority must notify the employee within 5 business days that the leave will be designated as FMLA leave and counted toward the 12 week entitlement.

The employee may initially be notified of the FMLA designation either orally or in writing. If notified orally, however, the appointing authority must follow up with written notification no later than the following payday. If the next payday is less than one week after the oral notice, the appointing authority must notify the employee no later than the subsequent payday.

FMLA leave designation should be made before the leave period begins, unless the appointing authority does not have enough information at the time to make this determination. If the appointing authority has knowledge that a request for paid leave is for FMLA reasons at the point the employee either gives notice or actually begins the leave period, and fails to designate the leave as FMLA leave at that time, any leave already used may not be designated retroactively as FMLA leave. In this situation, only leave used at the point the employee is notified may be designated as FMLA leave and counted toward the 12 week entitlement.

If the appointing authority learns that paid leave is for FMLA reasons after the leave period has begun, the entire or some portion of the leave may be retroactively counted as FMLA leave to the extent that the leave period qualified as FMLA leave. The appointing authority may only designate leave as FMLA leave after an employee has returned to work in the following circumstances:

A. The appointing authority does not learn that an employee's absence was due to FMLA reasons until the employee returns to work. If the appointing authority notifies the employee of the leave designation within 2 business days of the employee's return, the leave may be designated retroactively. If an employee returning to work did not inform the appointing authority prior to the leave period that the leave was for FMLA reasons and he or she wants the leave designated as FMLA leave, the employee must notify the appointing authority within 2 business days of returning to work of the reason for the leave.

B. If the appointing authority knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or medical certification or second or third opinions have been requested but not yet received, the appointing authority should make a preliminary designation and notify the employee of this designation at the time the leave begins. When information arrives confirming that the leave used is for FMLA reasons, the preliminary designation then becomes final. If the requested information fails to confirm that the leave needed is for FMLA reasons, the appointing authority must withdraw the designation in writing. **(U.S. Dept. of Labor Form# 382 Designation Notice**

HEALTH BENEFIT REQUIREMENTS

For the duration of FMLA leave, the state shall maintain an employee's health coverage under the Group Insurance Plan under the same conditions coverage would have been provided if the employee continuously worked during the leave period. Policy information regarding health insurance coverage in

relation to the provisions of FMLA is provided by the Division of Benefits Administration in the Department of Finance and Administration.

It is very important that the appointing authority (or designee) communicate approval of FMLA leave to the Agency Benefit Coordinator (ABC). The ABC is responsible for notifying Benefits Administration (BA) of leave status changes for an affected employee. The practice of force collecting 100% of the premium from an agency, no longer exists. Agencies will continue to be billed for the agency/employee portion of the premium monthly, and the employee will be billed at their home address for their portion of the premium due. If the employee does not pay their portion (20%) of the premium, the coverage is subject to suspension from the last paid period. Per federal regulations, Benefits Administration (BA) can no longer cancel an individual's medical coverage who is on approved family medical leave due to non-payment of premiums. The Agency Benefits Coordinator (ABC) should try to make arrangements with the affected employee to pay their premiums before the employee goes out on FMLA, to prevent an interruption in service. If premiums are not received timely, BA will suspend the coverage until the affected employee returns to work or once the premiums are paid in full.

The agency ABC should also notify the employee that premiums in arrears will be deducted from their payroll once the employee returns to a positive pay status, unless BA receives written notification that the employee wishes to change the effective date of coverage to the first of the month following their return from FMLA absence.

Benefits Administration will send notices to employees who are identified on approved FMLA and are more than 30 days past due that their coverage will be suspended if payment is not received by the end of that month. BA will **not** notify agencies when an employee has not paid their premiums. It is the employee's responsibility to ensure the premium payment is received timely in order to prevent the suspension of coverage, and continue receiving medical services.

If Benefits Administration suspends coverage due to an employee's non-payment, the coverage can be reinstated when the employee returns from leave. The reinstatement can be effective retroactively to the date of suspension or the first of the month following the return from leave. This will be the employee's choice. If they choose to retroactively reinstate the coverage once payment is received in full, claims for the period of suspension can be resubmitted for reimbursement or payment. If they choose to have the coverage effective after the return from leave, Benefits Administration will refund the agency any premiums that were deducted during the suspension.

JOB RESTORATION REQUIREMENTS

Upon return from FMLA leave, an employee must be restored to his or her original position or to an equivalent position, which is *virtually identical* in terms of pay, benefits and other employment terms and conditions. This includes restoration to a position having the same or substantially similar duties and responsibilities and having substantially equivalent skill, effort, responsibility and authority.

An employee returning from FMLA leave is entitled to any general increases that all other state employees have received during the period the employee was on leave. The employee is also entitled to shift or work schedule assignments equivalent to those in effect prior to the beginning of the leave period and to a work location assignment geographically close to the one where previously employed.

If an employee can no longer perform the essential functions of the position, the employee has no rights to job restoration under FMLA provisions. However, the employee may have certain rights under the Americans with Disabilities Act and the Americans with Disabilities Act Amendment Act, which must be taken into consideration. Please make sure to discuss these considerations with your legal counsel.

In situations where an employee notifies the appointing authority that he or she is not returning to work, the obligation to restore the employee to a position and to maintain health benefits (subject to COBRA requirements) ends. Should the employee indicate he or she is unable to return to work but continues to want to return, restoration requirements and health benefits remain in effect through the end of the 12 week FMLA leave period.
NOTE: An employee has no greater right to job restoration with equivalent benefits and conditions of employment than he or she would have had if continuously employed. Thus, if a work location is closed, a shift eliminated, overall work hours for an entire unit reduced, or positions abolished through a reduction in force, the employee is only entitled to conditions that would have been in effect for the employee if the leave had never been taken.

For example, if an employee's shift is eliminated while the employee is on leave, the employee is not entitled to assignment to the previous shift's work hours or to shift differential pay when that employee returns from leave that other employees formerly on the shift no longer receive. However, the employee is entitled to employment in a position meeting all other previous employment conditions.

In layoff situations, obligations to continue an employee's period of FMLA leave end with the effective date of the layoff.

Job Restoration for Employees Leased from a Temporary Agency
If an agency uses an employee from a temporary agency and that employee goes on FMLA leave, the employee is entitled to return to the same assignment as the one held before beginning the FMLA leave period if the agency is still using temporary services at the point the employee is ready to return to work.

EMPLOYEE NOTIFICATION REQUIREMENTS
When the need for unpaid leave is foreseeable, an employee must provide at least 30 days advance notice prior to the date the leave is to begin. In situations where 30 day notification is not possible because the employee has no knowledge of the exact time when the leave will need to begin or because of change or circumstance or medical emergency, notice must be given as soon as practicable, normally within one or two business days of when the employee knows the date leave will be needed.

The employee should notify the supervisor of the need for leave and the anticipated timing and duration of the leave. The supervisor may request additional information to determine if the employee is requesting FMLA leave specifically and to obtain the necessary details of the leave being taken.

Absent unusual circumstances, employees failing to provide notice of the need for FMLA leave within the required time frames may be subject to disciplinary action; however, they may not be denied the leave.

When an employee chooses to use accumulated sick, annual or compensatory leave balances toward the 12-week entitlement, employees must notify their appropriate manager as required by policy or practice.

Notification Prior to Return to Work

An employee may not be required to take more leave than necessary to address circumstances resulting in the need for leave. If an employee is returning to work sooner than expected, the employee must give the appointing authority 2 business days notice of the changed circumstances before the appointing authority is required to restore the employee to his or her former or comparable position.

EMPLOYEE MEDICAL CERTIFICATION REQUIREMENTS

Situations Where Appointing Authority May Require Medical Certification

The appointing authority may require that an employee's request for leave be supported by certification from a health care provider in situations where the leave is requested to care for the employee's seriously ill spouse, son, daughter, parent, or next of kin for qualified military leave, or due to the employee's personal serious health condition. The appointing authority must give written notice to the employee of the requirement to provide medical certification each time certification is required.

When the need for leave is foreseeable, the employee should provide medical certification before the leave begins. When this is not possible the employee must provide this information within the time frame requested by the appointing authority. At least 15 calendar days must be allowed for the employee to provide requested medical certification unless this is not possible under the circumstances, such as an employee's personal health condition preventing his or her ability to obtain the necessary information in a timely manner.

Any request for medical certification should be made at the time the employee requests leave or within 2 business days. If the leave was unforeseen, the certification should be requested within 2 business days after the leave has begun. If the appointing authority has reason to question the appropriateness of the leave or its duration, certification may be requested at a later date. An employee should be advised of the consequences of not providing medical certification at the time the certification is requested.

Allowable Medical Certification Information

The appointing authority may request <u>only</u> the following information from a health care provider certifying an employee's personal serious health condition or that of a son, daughter, parent, or next of kin. A sample form is provided and should be used to obtain this information:

A. A statement or description of the appropriate medical facts regarding the patient’s health condition for which leave is requested.

B. The approximate date the serious health condition began and its probable duration, including the probable duration of the patient's present incapacity. Whether it will be necessary for the employee

to take intermittent leave or work a reduced schedule and the probable duration of such a schedule. The certification may state if the condition is pregnancy or a chronic condition, whether the patient is presently incapacitated and the likely duration and frequency of periods of incapacity.

C. If additional treatments will be required for the condition and an estimate of the probable number of treatments. If the patient's incapacity will be intermittent or require a reduced work schedule, an estimate of the probable number of and interval between such treatments and period required for recovery. If any of the treatments listed above will be provided by another provider of health services, the nature of the treatments. If a regimen of continuing treatment by the patient is required under the supervision of the health care provider and a description of the regimen.

D. If medical leave is required because of the employee's own condition, information may be requested on whether the employee is unable to perform any one or more of the essential functions of the position, including a statement of the essential functions the employee is unable to perform. If the employee is able to perform work of any other kind and if the employee must be absent from work for treatment.

E. If the leave is required to care for a family member, information may be requested on whether the patient requires assistance for basic medical or personal needs or safety, or for transportation or, if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee must provide information on the care provided and an estimate of the time period involved. If the employee's family member will need care only intermittently or on a reduced leave schedule, the probable duration of the need.

F. If the employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee 7 calendar days to cure the deficiency.

Once an employee has submitted a complete medical certification document signed by the employee's or family member's health care provider, the appointing authority may not request <u>any</u> additional information from that health care provider. The employee's appointing authority may only contact the employee's health care provider to verify the authenticity of or clarify the medical certification.

(See U.S. Dept. of Labor Form# WH-380E)

Military Leave Certification Requirements

A. An employee requesting leave for a qualifying exigency must submit a copy of the covered military member's active duty orders and certification providing the appropriate facts related to the particular qualifying exigency for which leave is sought. This information may include contract information if the leave involves meeting with a third party.

An employee requesting leave to care for a covered service member with a serious injury or illness must submit a certification form completed by an authorized health care provider or a copy of an Invitational Travel Order or Invitational Travel Authorization issued to any member of the covered service member's family.

(See U.S. Dept. of Labor Form# WH-384) *(See U.S. Dept. of Labor Form# WH-385)*

Requesting Second and Third Opinions

If the appointing authority has reason to question the validity of the medical certification or if the employee refuses to grant the employer's health care provider permission to contact the employee's health care provider concerning the medical certification, the employee may be required to obtain a second opinion from another health care provider at the agency's expense. Although the appointing authority may select the health care provider to provide the second opinion, the provider selected cannot be employed by the State of Tennessee on a regular basis or be under any contract or agreement with the state to provide second opinion services, in most circumstances.

If the opinions of the employee's and appointing authority's health care providers differ, the appointing authority may obtain another certification from a third health care provider at the agency's expense. This health care provider must be one agreed upon by both parties and the third provider's opinion is considered final and binding.

Pending receipt of the second or third opinions, the employee is provisionally entitled to FMLA status. If the certifications do not establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under established leave policies.

The appointing authority is required to provide the employee with a copy of the second and third opinions, where applicable, upon request by the employee. Requested copies must be provided within 5 business days of the request, unless extenuating circumstances prevent this from being possible.

When the appointing authority requires the employee to obtain a second or third opinion, the employee must use paid leave or be in a without pay status and the appointing authority must pay for any reasonable out-of-pocket travel expenses.

Second and third opinions and recertification are not permitted for certification of a covered service member’s serious injury or illness or a qualifying exigency. A health care provider, a human resource professional, a leave administrator, or a management official, but not the employee’s direct supervisor, may be used to authenticate or clarify a medical certification of a serious injury or illness, or an Invitational Travel Order or Invitational Travel Authorization. Additionally, the individual or entity named in a certification of leave for a qualifying exigency may be contacted for purposes of verifying the existence and nature of the meeting.

Requesting Recertification of Medical Conditions

The appointing authority may request recertification of a medical condition as considered necessary. For most situations, the intervals between these requests can be no less than 30 days, except in situations where (1) the employee requests an extension of leave; (2) circumstances described in the original certification have changed significantly, or (3) the appointing authority has obtained information conflicting with the validity of the certification.

In the case of pregnancy, chronic or permanent long-term medical conditions, the appointing authority may request recertification no more than once every 30 days unless (1) circumstances described in the previous certification have changed significantly or (2) the appointing authority receives information which casts doubt on the employee's stated reason for the absence. If the minimum duration of the period of incapacity specified on the medical certification is more than 30 days, the appointing authority

may not request recertification until that minimum duration has passed, unless one of the conditions set forth above is met. When FMLA leave is taken intermittently by an employee who is pregnant or who has a chronic or permanent long-term medical condition, the appointing authority may not request recertification in less than the minimum period specified on the certification as necessary for such leave unless one of the conditions in the first paragraph of this section is met.

Employee Failure to Provide Medical Certification

An employee who fails to provide certification within the requested allowable time frame (minimally 15 calendar days) may be denied leave until certification is provided if the leave was foreseeable.

When the need for leave is unforeseeable, an employee must provide certification within a reasonable period of time determined by the appointing authority based on the particular medical circumstances. An employee failing to provide certification within this time frame may be denied leave continuation.

Requiring Medical Certification for Reinstatement

In situations where an employee is on FMLA leave due to a serious health condition preventing the performance of his or her job duties, the appointing authority may require, as a condition of the employee's restoration to a position, medical certification from a health care provider that the employee is able to resume work and perform the essential functions of the job. In order for this requirement to be permissible, the appointing authority must have uniform policies or practices in place that are consistently applied for all employees taking leave under similar circumstance. When an appointing authority does have such policies, an employee requesting FMLA leave must be notified of the requirement for medical certification prior to job restoration, either before or immediately after the leave period begins. The appointing authority's requirements for employees returning to work must be job-related and consistent with business necessity, as required under ADA and ADAAA provisions. When notification has been properly given and policies applied uniformly, the appointing authority may deny position restoration to an employee until medical certification is submitted.

PROHIBITION AGAINST DISCRIMINATORY PRACTICES

Provisions of FMLA prohibit interference with an employee's rights to family and medical leave under the law and from discrimination against an employee using family and medical leave. Appointing authorities should review existing internal practices to ensure compliance.

REQUIREMENTS FOR PROVIDING INFORMATION ON FMLA RIGHTS AND RESPONSIBILITIES

The appointing authority must post notices explaining FMLA provisions and providing information on how to file a complaint (or complaints) for violations of the Act. These notices must be posted in conspicuous places where employees and applicants can easily access the information provided.

If an agency has an employee handbook or other document explaining employee benefits or leave rights, information regarding FMLA entitlements and employee obligations under the Act must be included. If an agency does not have a handbook or other policy document, the appointing authority

must provide written guidance to the employee regarding his or her rights and obligations every time the employee is notified of the FMLA leave designation.

The appointing authority must also provide the employee with written notice detailing specific employee obligations and consequences of failure to meet these obligations. This information must be provided no less than once each 6 month period that an employee gives notice of the need for FMLA leave. The following information must be included: (1) that the leave will be counted against the employee's FMLA leave entitlement; (2) any requirements for furnishing medical certification of a serious health condition and information regarding the consequences of not providing this information; (3) the employee's option to substitute paid leave in specific situations and conditions related to the substitution; (4) the requirement for the employee to make health insurance premium payments, procedures for making these payments and possible consequences of failing to make these payments in a timely manner; (5) any requirement to present medical certification as a condition of job restoration following conclusion of the leave period; (6) the employee's right to job restoration upon return from leave; and (7) the employee's potential liability for the employer's portion of the health insurance premium payments should the employee fail to return to work after taking FMLA leave.

The notice must be given within a reasonable time after the employee notifies the appointing authority of the need for FMLA leave, preferably between one and two business days. If the leave has already begun, the notice should be mailed to the employee's address of record.

If the specific information originally provided in the notice changes due to a subsequent period of FMLA leave during the 6 month period, the appointing authority must notify the employee within 2 business days of receiving notification of the need for additional FMLA leave of any changes that are being made to the original information provided. For example, if the initial leave period was paid and the subsequent leave period is unpaid, the employee must be notified of the need to pay his or her portion of the insurance premium.

If the initial notice to the employee for the 6 month period and the agency's handbook or other written documentation clearly indicate the agency's requirements for the employee to provide medical certification or "fitness for duty" information, then subsequent notification to the employee of these requirements is not necessary. If, however, this information has never been provided to the employee, then any requirements for medical certification or "fitness for duty" information must be provided in writing to the employee every time the employee notifies the appointing authority of the need for leave.

If the appointing authority does not provide the employee with required notices, no action can be taken against the employee for failure to comply with the employee's obligations. If an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable. **(See DOHR Form# PR-0447 – FMLA Notice of Eligibility and Rights)***

RECORD-KEEPING REQUIREMENTS

The appointing authority in each agency is responsible for maintaining required records for all employees using FMLA leave for at least 3 years. FMLA leave will not be tracked within Edison and must be maintained manually at the agency level. In addition to basic payroll and employee data and policy documentation, the following records are required:

A. Dates FMLA leave is taken by each employee and clear designation of this time as FMLA leave.

B. Hours of leave taken, if the amount is less than one full day.

C. Copies of employee notices of FMLA leave sent to the appointing authority, if in writing, and copies of general and specific notices given to employees as required under FMLA guidelines.

D. Records of any dispute between the employee and appointing authority regarding the designation of leave as FMLA leave.

E. Any work schedule agreed upon by the appointing authority and employee, in situations where intermittent leave or leave on a reduced work schedule has been approved.

F. Medical certification, recertification, and medical history documentation. All medical information must be maintained separately from other personnel information.

G. Military orders.

Authority:
T.C.A. §8-30-215
Department of Human Resources Rule 1120-6

Form#	FMLA Forms
PR-0447	DOHR FMLA Notice of Eligibility and Rights (PDF) *
WH 380-E	FMLA Certification for Employee's Serious Health Condition (PDF) **
WH 380-F	FMLA Certification for Family Member's Health Condition (PDF) **
WH 385	FMLA (Military Family Leave) Certification for Serious Injury or Illness of Covered Servicemember (PDF) **
WH 384	FMLA (Military Family Leave) Certification of Qualifying Exigency (PDF) **
WH 382	FMLA Designation Notice (PDF) **

NOTE:

* Form# PR-0447 is only accessible through DOHR website. Not accessible at U.S. Department of Labor web address.

** Forms are also accessible at http://www.dol.gov/ESA/WHD/FMLA/